IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 149 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BAVA SOMBHARTHI SHANKARBHARTHISINCE D/D THROUGH HIS HEIRS:
Versus
PUROHIT LAXMIPATI KESHAVLAL

Appearance:
Mr. D.M. Bharati for the appellant
Mr. S.M. Shah for respondents.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 10/08/2000

CAV JUDGEMENT

1. This appeal filed under Section 100 of the Civil Procedure Code ('the Code' for short hereinafter) questions legality, validity and propriety of the judgment and decree dated January 19, 1985 rendered in Regular Civil Appeal no. 124 of 1984 by learned Extra Assistant Judge, Mehsana by which the judgment and decree

dated September 30, 1981 declaring the respondents as owners of the suit plots and ordering the appellant to handover the possession thereof, recorded in Regular Civil Suit No. 33 of 1974 by learned Civil Judge (J.D.)., Chansma came to be confirmed and maintained by dismissing the appeal.

2. The suit in question was filed by the respondents for relief of declaration that they were the owners of the suit plots and to obtain the possession thereof from the appellant.

3. The appellant was the original defendant whereas the respondents were the original plaintiffs and for the sake of convenience and brevity they shall be referred to as the plaintiffs and the defendant hereinafter in this judgment.

4. The facts giving rise to the present appeal moves in narrow compass and as per the averments made in the plaint they are as under:

4.1. Deceased Keshavlal Purohit, who was the father of the plaintiff Nos.1 and 2 and husband of plaintiff No.3 had purchased the suit plots by a registered sale deed dated February 3, 1947 from deceased Shanker Bharati, who was the father of the defendant, in consideration of Rs.1,600/- By virtue of the registered sale deed, the possession was also handed over to deceased Keshavlal Purohit and since then deceased Keshavlal Purohit became the owner as well as occupier of the suit plots.

4.2. Keshavlal Purohit had expired on June 22, 1971. After the demise of Keshavlal Purohit, the plaintiffs became the owners of the suit plots and were in possession thereof. The plaintiffs applied for permission to construct on the suit plots vide application dated April 20, 1973 before Bechar Gram Panchayat and Bechar Gram Panchayat granted permission on May 13, 1973 by passing resolution No.1. Thereafter the defendant applied before the Sub Divisional Magistrate, Patan under section 145 of the Criminal Procedure Code ('Cr.PC' for short) vide application dated May 9, 1973 with a prayer to restrain the plaintiffs from constructing on the suit plots. The Sub-Divisional Magistrate in exercise of powers conferred under section 145 of Cr.PC in Criminal Case No. 141 of 1973 held that the defendant was in possession of the suit plots and the plaintiffs were restrained from obstructing the possession of the defendant until the defendant is removed by due process of law. In view of this, the

plaintiffs were, obliged to file the suit and prayed for reliefs to which reference has been made in earlier paragraphs of this judgment.

4.3. The defendant resisted the suit by filing written statement by contending inter alia that the suit plots were ancestral property of the defendant and by virtue of the family partition the suit plots came to the share of the defendant along with his brothers and since then he was in possession and occupation of the suit plots. It was further contended by the defendant that his father late Shanker Bharati had no right to sell the suit plots to the plaintiffs since the defendant was a member of the Hindu Undivided Family and he was interested in the suit plots. It was also contended that his deceased father Shanker Bharati had no necessity to sell the suit plots to the deceased father of the plaintiffs. It was further contended that his two brothers and mother Hiraben was alive when the sale deed was executed but deceased Shanker Bharati had not taken their consent to sell the suit plots and hence the sale could not be effected since deceased Shanker Bharati had no right or authority to sell the suit plots. It was also further contended that the sale in question was not binding to the defendant since it was void transaction. It was further contended that the brothers and mother of the defendant were necessary parties in the proceedings and without joining them as party the suit was not maintainable. Lastly it was contended that the defendant was in continuous possession of the suit plots for a period of more than 12 years with the knowledge of the deceased Keshavlal Purohit and the present plaintiffs and, therefore, the defendant had become the owner of the suit plots by adverse possession. It was, therefore, contended that the plaintiffs were not entitled to the declaration as prayed for and to recover vacant possession of the suit plots from the defendant. It was, therefore, prayed for the dismissal of the suit with costs.

4.3. The learned trial Judge after framing issues recorded evidence and on appreciation and evaluation thereof and on hearing the submissions advanced by the learned advocates for the parties came to the conclusion that the the suit plots were not ancestral properties of deceased Shanker Bharati and, therefore, the sale deed dated February 3, 1947 executed by him was not null and void and the suit plots had not come to the share of the defendant and his brothers and mother. Therefore, the plaintiffs were the owners of the suit plots and they were entitled to declaration as prayed for and the possession of the suit plots. It was also held by the

learned trial Judge that the defendant had failed to prove that his deceased father had sold the suit plots to deceased Keshavlal Purohit without any legal necessity and also that the suit was not bad for non-joinder of necessary parties. Lastly, it was held that the defendant was not the owner by adverse possession of the suit plots. As a result of the aforesaid findings, he passed the decree in favour of the plaintiffs vide judgment dated September 30, 1981.

4.4. Aggrieved by the judgment and decree recorded by the learned trial Judge, the defendant approached the District Court of Mehsana by filing Regular Civil Appeal No. 124 of 1981. The learned Extra Assistant Judge, Mehsana on reappreciation and reevaluation of the evidence held that the suit plots were not ancestral property of Shanker Bharati and, therefore, the defendant had no right and interest in the suit plots and deceased Shanker Bharati had authority to sell the suit plots to deceased Keshavlal Purohit by registered sale deed dated February 3, 1947 and by virtue of the said registered sale deed deceased Keshavlal Purohit became the owner and occupier of the suit plots. The learned lower appellate Judge also held that the defendant had failed to prove not only that his deceased father had executed the said registered sale deed without any legal necessity but also he had become owner of the suit plots by adverse possession. However, he held that the defendant was in possession of the suit plots on the day of filing of the suit. He, therefore, confirmed the findings recorded by the trial court by affirming the judgment and decree vide judgment and decree dated January 19, 1985 by dismissing the appeal.

5. It is this judgment and decree which has given rise to the present Second Appeal which was admitted on the following substantial question of law:

> "Whether the Lower Appellate Court has erred in finding that the appellant's plea of adverse possession of the suit property could not be upheld as he had taken inconsistent plea of ownership by title and that plea of adverse possession against the plaintiffs could not be accepted?"

6. Mr.D.M. Bharati, learned advocate for the defendant, contended that both the courts below have erred not only in holding that the suit plots were not ancestral property but also in holding that the mother and brothers of the defendant were not necessary parties.

It was also contended that no ample and reasonable opportunity was given to the defendant to lead evidence of generation which was an important question and the principles of natural justice were also violated by both the Courts below. What was stressed by the learned advocate for the defendant was that both the courts below have failed in rejecting the contention of adverse possession over the suit plots propounded by the defendant. What was emphasized by the learned advocate for the defendant was that both the courts below have committed grave error in law in not considering the plea of adverse possession over the suit plots by saying that the defendant had taken inconsistent plea of ownership by title over the suit plots. According to him, there was no bar in law to take alternate plea of ownership by virtue of title as well as ownership by way of adverse possession. He, therefore, urged that the substantial question of law formulated by this Court at the time of admission of this appeal requires to be considered by this Court by holding that alternate plea of ownership by virtue of title as well as by adverse possession is permissible in law. He, therefore prayed that the judgment and decree recorded by the trial court and confirmed by the lower appellate court is required to be quashed and set aside by allowing this appeal and thereby dismissing the suit filed by the plaintiffs by holding that the defendant has become owner by adverse possession.

7. Mr. S.M. Shah, learned advocate for the plaintiffs, contended that in fact there was no substantial question of law which is required to be considered and answered by this Court. Moreover, the concurrent finding of fact recorded by both the Courts below, except in exceptional circumstances, cannot be assailed in Second Appeal where the jurisdictional sweep of the High Court is very much circumscribed. It was pointed out by the learned advocate that the submissions advanced by Mr. Bharati, learned advocate for the defendant, are relating to the questions of fact and since this appeal is admitted only on one substantial question of law, the submissions in connection with any other fact other than on the substantial question of law, cannot be entertained. It was also pointed out by learned advocate that both the courts below have unequivocally held that the plaintiffs' father had purchased the suit plots by registered sale deed and since then he became the owner and occupier of the suit plots and after his demise the plaintiffs became the owners and occupiers of the suit plots by virtue of heirship and also came in possession of the suit plots.

What was stressed by the learned advocate was that since the plaintiffs were residing at Modhera which was away from the suit plots and the defendant was residing in adjoining premises, casual occupation without the knowledge of the plaintiffs was not sufficient to attract the plea of adverse possession. What was emphasized by the learned advocate was that since the defendant had raised the plea of ownership by succession from the very beginning it cannot be held that he had kept possession of the suit plots with him knowing fully well that the owners of the suit plots were the present plaintiffs or their ancestor - deceased Keshavlal Purohit. It was also maintained by the learned advocate that since the defendant had claimed to be in possession of the suit plots as exclusive owner of the suit plots then it cannot be said that such fact of possession is sufficient to give a right of ownership to the defendant against the rightful owner of the suit plots. Lastly it was contended by the learned advocate that since deceased Keshavlal Purohit had purchased the suit plots by a registered sale deed he became the owner and the suit plots came in the possession the plaintiffs being the heirs and legal representatives of Keshavlal Purohit. He, therefore, urged that the appeal being devoid of merits is required to be dismissed.

8. It may be appreciated that there is no manner of doubt that the deceased Keshavlal Purohit had purchased the suit plots from deceased Shanker Bharati by a registered sale deed dated February 3, 1947 in consideration of Rs.1600/- and he became the owner of the suit plots by virtue of the said sale deed and the suit plots also came in his possession. There is also no manner of doubt that deceased Shanker Bharati was the absolute owner of the suit plots since the suit plots were not his ancestral property and, therefore, he had every right to sell the suit plots and the defendant cannot claim share and interest in the suit plots as a member of the Hindu Undivided Family. On the aforesaid aspect, the finding of both the courts below was concurrent. It is also true that on the day of filing of the suit the defendant was in possession of the suit plots as held by the Sub Divisional Magistrate, Patan in Criminal Case No. 141 of 1973 in exercise of powers conferred under Section 145 of Criminal Procedure Code and, therefore, the defendant cannot be evicted or removed from the suit plots without due process of law; meaning thereby the defendant was in possession of the suit plots not as an owner of the suit plots by virtue of the title.

9. Now the only question which requires to be considered is as to whether the plea of ownership by virtue of title and by virtue of adverse possession can be said to be inconsistent in the facts and circumstances of the case. It is well settled position of law that it is necessary to show physical facts of exclusive possession and intention to hold the property as an owner to constitute an adverse possession. It is also very clear that if an act of hostile possession is done upon a property in the belief that another person is the owner of the property and if it is done continuously for a period prescribed then such an act can constitute adverse possession. To claim adverse possession, possession must be open and hostile to the real owner. The party who claims adverse possession is required to plead and establish all the facts necessary to establish his adverse possession as it is not a pure question of law but a mixed question of fact and law. It is also necessary to specifically set out as to the date on which the defendant started adversely in order to claim adverse possession. The person who claims adverse possession must prove the nature and commencement of adverse possession and its knowledge to the real owner. Mere possession howsoever long is not sufficient to create adverse possession. The question whether possession is adverse or not is often one of simple fact, but it may be a conclusion of law or a mixed question. It is a question of legal conclusion to be drawn from the findings on simple facts. The following principles are well established:

(a) In order to establish adverse possession it must be shown that possession was adequate in publicity, in continuity and in extent.

(b) It is sufficient that the possession should be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware what is happening.

(c) It is not necessary in order to establish adverse possession that proof of acts of possession should cover every moment of the requisite period. The facts of possession may be continuous though actual acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription. The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible.

A series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if in fact there has been interruption, possession during such interruption must be deemed to be with the person having the lawful right. It must also be actual as opposed to ideal possession.

10. In the backdrop of the aforesaid well settled principles of law on adverse possession, if we examine the instant case, on perusal of the case propounded by the defendants, in the facts and on the circumstances emerging from the record of the case, it is seen that there was no sufficient and reliable circumstance on record which can create a right of ownership in favour of the defendant by way of adverse possession. It is also clear that the defendant had claimed possession of the suit land as an owner from the very beginning by virtue of the fact that he was a member of the Hindu Undivided Family. Thus it was evident that the defendant had not kept possession of the suit plots with him knowing that owner of the suit plots was or is the plaintiffs or their ancestor - deceased Keshavlal Purohit. When the defendant had claimed to be in possession as an exclusive owner of the suit plots then it cannot be said that such fact of possession was sufficient to give a right of ownership to the defendant against the rightful owner of the suit plots. It had also come in evidence that the suit plots were open land. It was also noticed from the sale deed Ex. 70 that the suit plots were situated near the open land of which the possession and ownership was of the defendant. It had also come in evidence that the present plaintiffs and even their ancestor deceased Keshavlal were staying at Modhera and not at village Bechar in which the suit plots were situated. It cannot be gainsaid that if the rightful owner of the suit plots were not staying in that village and when the suit plots were open pieces of land and when the suit plots were situated nearby the property of the defendant, the possibility that the defendant might be using the suit plots for storing grass, for keeping cart, plough, etc., cannot be ruled out. It is settled proposition of law that by mere such use of the disputed plots for tethering cattle or keeping cart, plough, etc., as it was open land cannot be said to be sufficient to make a right of the rightful owner of the suit land hostile. The totality of the evidence unequivocally suggests that there was no sufficient and reliable circumstance on record of this case which could show that the possession of the defendant on the suit plots became hostile to the right of the plaintiffs merely because the defendant was using

the said plots for such purposes as it was open land. So in my view, the contention of the learned advocate for the defendant that the defendant was in possession of the suit plots on the ground of adverse possession also cannot be accepted in the peculiar facts and circumstances emerging from the record of the case.

11. In the case of Lala Asa Ram and another v. Lala Ram Chander, AIR 1939 Allahabad 161, it was held by a Division Bench of Allahabad High Court in Letters Patent Appeal No. 28 of 1937 that the possession required to establish a title to immovable property under the Limitation Act. S. 28 and Art. 144 must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. The mere tethering of cattle on the land which is waste land and the storing of logs thereon, is no indication of possession which is intended to be adverse to the title of the proprietor of the land.

12. In the case of Mahadev Malhar Lad v. Mohamadrasul Hatelsaheb Shaik, AIR 1971 Mysore 139, the High Court of Mysore has held that the act of the defendant putting up bamboo and Kalli fence and constructing urinal on open site which were of such a temporary nature that they could not be construed as creating title in defendant by adverse possession.

13. In the case of Kaladhari Singh v. Jibachh Mishra, AIR 1939 Patna 399, the Patna High Court has observed as follows:

> "In deciding question of adverse possession the nature of the right exercised by the parties and the relationship between them will have to be looked into in order to see whether the acts were permissible or so trivial as not to be noticed. In a case where the land is adjoining the house of the defendants and the plaintiff is not a resident of that locality where the land is situate little acts of possession cannot be effectively taken notice of at once by the plaintiff against whose interest they were exercised. If therefore a small piece of land of no present use to the owner but convenient in many other ways to the neighbour is made use of by the latter by doing on it acts of possession all however of a flimsy and temporary character such as stocking straw and logs of wood, building sheds and removing earth therefrom without objection for more than 12 years such a user

> excites no particular attention. It is neither meant to denote, nor understood as denoting on the side of the other a claim to the ownership of the land. Where such and no more is the case, it would be altogether wrong to hold that a claim to title by adverse possession has been made out."

14. In the case of Premji Cursetji v. Goculdas Madhowji, ILR 16 Bombay 338, the contention raised before the Bombay High Court was that a small piece of land being of no present use to its owner and being convenient in many ways to his neighbour, the latter made use of it, in various ways without objection for more than 12 years. A privy and sheds for cows, goats, fowls, etc., and a hut for a ghadriwalla - all however structures of a flimsy and purely temporary character were said to have been constructed and maintained for many years on the said piece of land. Such user, it was contended amounted to adverse possession. The Bombay High Court in the said case held that such user as this was insufficient to give a title to the land by adverse possession. User of this sort under similar circumstances is common in this country and excites no particular attention. It is entire intended to denote, or understood as denoting - on the one side or the other - a claim to the ownership of the land, and where this, and no more, is the case it would be wrong to hold that a claim by adverse possession has been made out.

15. Lastly, it would be appropriate to make reference to the judgment in the case of Indira v. Arumugam and another, (1998) 1 SCC 614, wherein it was held by the Supreme Court that when the suit for possession of immovable property based on title is established on the basis of the relevant documents and other evidence, unless the defendant proves adverse possession for the prescriptive period the plaintiff cannot be non-suited.

16. In light of the aforesaid discussion and case law referred to hereinabove, I am of the opinion that so long as plea of title is advanced, the adverse possession cannot be claimed as such against the title holder since the very basic principle of plea of adverse possession is that the person who claims the adverse possession must have kept the possession of the suit land with him knowing that another person is the owner of the suit land. So far as the instant case is concerned, the defendant had raised the plea of adverse possession by virtue of claiming share as a member of the Hindu Undivided Family. He had kept the possession with him without knowing that deceased Keshavlal Purohit or the

plaintiffs were the owners of the suit plots. The defendant for the first time came to know about this fact when the plaintiffs had made an application dated April 20, 1973 to Bechar Gram Panchayat for permission for construction and when such permission was granted by the Gram Panchayat by passing resolution No.1 dated May 13, 1973. Thereafter, the defendant filed the application before the Sub Divisional Magistrate, Patan claiming that he was in possession of the suit plots and immediately thereafter the plaintiffs filed the suit in the year 1974. Therefore, it can be said that the defendant's possession prior to that date was without the knowledge of the plaintiffs, who became the owners by virtue of the registered sale deed and as held by catena of decisions temporary possession without knowledge of the true owner for the purpose of tethering cattle or for storing agricultural implements, etc., is not sufficient to claim the plea of adverse possession.

17. In view of the aforesaid discussion, the substantial question of law formulated by this Court is answered accordingly and against the defendant. It is held that the plea of ownership by virtue of title or by virtue of adverse possession being inconsistent, cannot be accepted, more particularly, in view of the fact that both the courts below have held that the defendant has failed to substantiate his plea of adverse possession and much less that he was also in continuous possession of the suit plots for more than 12 years prior to the institution of the suit.

18. In view of this, I am of the opinion that both the courts below were right in law and in facts in holding that the defendant had failed to prove that he had become owner by adverse possession. In the facts and circumstances of the case, no other conclusion was possible and permissible except the one which was arrived at by both the courts below. Therefore, I am of the opinion that the impugned judgment and decree does not warrant any interference of this court, on the contrary it requires affirmation of this court.

19. For the foregoing reasons, the appeal being devoid of any merit fails and accordingly it is dismissed with no order as to costs. Interim relief granted at the time of admission of the Second Appeal is vacated.

10.8.2000. (A.M. Kapadia, J.)

(karan)